# In the
# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

*v.*

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

## Jurisdictional Statement

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1038
*Attorneys for Appellants*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

## Table of Contents

## Table of Authorities Cited

### Cases





### Constitutional and Statutory Provisions



### Miscellaneous

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The Attorney General of the Commonwealth of Massachusetts, on his own behalf and as attorney for the district attorneys of the Commonwealth's ten administrative districts, submits this statement in support of his appeal from a final order and decision of the United States District Court for the

District of Massachusetts once again holding Massachusetts General Laws ch. 112, § 12S, unconstitutional and enjoining appellants from enforcing it. The Attorney General contends that the District Court's decision incorrectly interprets the Fourteenth Amendment to the Constitution of the United States and various decisions of this Court holding other state statutes related to the regulation of abortion surgery unconstitutional. The Attorney General also submits that appellants' appeal presents substantial questions which go to the heart of the states' traditional authority to protect their minor citizens and to regulate the practice of medicine. Thus, these questions warrant this Court's plenary consideration.

## Opinions Below

This case is before this Court for the second time. The District Court's original decision holding the statute unconstitutional was filed on April 28, 1975, and is reported at 393 F. Supp. 847 (D. Mass. 1975). This Court, in an opinion dated July 1, 1976, and reported at 428 U.S. 132, vacated the District Court's judgment on abstention grounds and remanded for further proceedings, including the certification of certain questions to the Massachusetts Supreme Judicial Court. The District Court certified nine questions to the Supreme Judicial Court on August 31, 1976, and the Supreme Judicial Court answered these questions in an opinion dated January 25, 1977. The Supreme Judicial Court's opinion appears in the official advance sheets at Mass. Adv. Sh. (1977) 96 and is published in the Northeastern Reporter at 360 N.E. 2d 288 (Mass. 1977). On February 3, 1977, the District Court issued its opinion and order granting a preliminary injunction against appellants, and this opinion is reported at 428 F. Supp.



854 (D. Mass. 1977). After trial in the fall of 1977, the District Court issued its opinion and entered a final order permanently enjoining appellants from enforcing the statute. This opinion, dated May 2, 1978, is reported at 450 F. Supp. 997 (D. Mass. 1978) and, pursuant to this Court's rules, is reprinted in the appendix to this statement (App. A).[1]

## Jurisdiction

The Attorney General appeals from a final order of a three-judge panel of the United States District Court for the District of Massachusetts. A single district judge convened the three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) because plaintiffs-appellees' complaint sought permanent injunctive relief under 42 U.S.C. § 1983 (1970) against the Attorney General and the Commonwealth's district attorneys, the state officials charged with enforcement of the statute's provisions.[2]

In summary, plaintiffs' complaint in the District Court claimed that the statute violates the due process and equal protection clauses of the Fourteenth Amendment by requiring a physician to obtain the consent of a pregnant minor's parents before performing an abortion, thus, according to plaintiffs, imposing a burdensome and discriminatory requirement. Upon remand and after receiving responses to its certified questions from the Massachusetts Supreme Judicial Court, the

[1] On June 20, 1978, the District Court issued an amended final order correcting a typographical error in its order of May 2, 1978. Both of these orders are also reproduced in the appendix (App. B).

[2] 28 U.S.C. § 2281 (1970) was repealed by 90 Stat. 1119. However, the repeal effected by this statute did not affect actions commenced on or before its date of enactment. 90 Stat. 1119, § 7.

District Court handed down its decision and entered an order on May 2, 1978, permanently enjoining appellants from enforcing the statute. The District Court's opinion, the opinion of its dissenting member, and its order of May 2, 1978, as amended by its order of June 20, 1978, are reproduced in the appendix (App. A and B). Appellants filed their notice of appeal in the District Court on June 26, 1978. A copy of this notice is also reproduced in the appendix (App. C).

Appellants have claimed their appeal to this Court pursuant to 28 U.S.C. § 1253 (1970). Cases which appellants believe sustain this Court's jurisdiction are *Maher* v. *Roe*, 432 U.S. 464 (1977); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976); and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

## Statute Involved

The District Court determined that Massachusetts General Laws ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, was unconstitutional. This statute differs significantly only in its codification identification from the statute which was before this Court in *Bellotti* v. *Baird*, *supra*.[3] The statute appears in the General Laws in the following form:

**Section 12S.**

> If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's

[3] The citation to the statute considered in *Bellotti* was G.L. ch. 112, § 12P. St. 1977, ch. 397, repealed § 12P and inserted § 12S in its place. Minor alterations in paragraphing and corrective reference changes without relevance to present purposes were also made.



> parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

## Questions Presented

1. Whether G.L. ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, violates the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery, those for whom parental consultation would not be in their best interests, and those incapable of giving "informed consent") under the Fourteenth Amendment to the Constitution of the United Stated by prohibiting physicians from performing abortion surgery upon such minors without first obtaining parental consent or judicial authorization and is therefore invalid on its face.

2. Whether the District Court correctly determined that plaintiffs-appellees might properly challenge G.L. ch. 112, § 12S, on its face rather than as applied to certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

3. Whether the District Court erred in refusing defendants-appellants permission to conduct a survey of health care provider consent practices in Massachusetts and in other significant ways failed to base its decision upon an adequate factual record.

4. Whether the District Court properly refused to enter an injunction carefully drawn to prohibit defendants-appellants from enforcing G.L. ch. 112, § 12S, only in those instances in which it had determined that enforcement would violate the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

5. Whether the District Court may order the defendants to pay plaintiffs' litigation costs incurred in this Court and the District Court "lost because of defendants' mistaken advocacy."

## Statement of the Case and Summary of Prior Proceedings

Plaintiffs-appellees commenced this civil rights action under 42 U.S.C. § 1983 (1970) in December, 1974. The original plaintiffs were William Baird, four female adolescents who sued under pseudonyms, Parents' Aid Society, Inc., and Gerald Zupnick. The original defendants were the Attorney General



of the Commonwealth and the district attorneys of the ten administrative districts. The District Court permitted certain parents to intervene as defendants and dismissed three of the adolescent plaintiffs and all of the intervening parents save Jane Hunerwadel from the case for want of proof. *Baird* v. *Bellotti*, 393 F. Supp. 847, 849-850 (D. Mass. 1975) (*Baird I*). Plaintiffs sought certification of the action as a class action, and, at least with respect to Mary Moe I, Parents' Aid Society, Inc., and Gerald Zupnick, the District Court determined that they were adequate representatives of the classes they sought to represent and certified the action "as a valid class action as to all." *Baird I* at 852.[4]

Plaintiffs brought their action as a "facial attack" on G.L. ch. 112, § 12P, as inserted by St. 1974, ch. 706, and now renumbered by St. 1977, ch. 397 (the statute), and sought declaratory and injunctive relief. *Baird I* at 849. The District Court granted a temporary restraining order and preliminary injunctive relief and, after trial, issued an opinion and entered an order permanently enjoining the defendants from enforcing the statute. *Baird I* at 857. Defendants appealed to this Court on May 16, 1975, and, in a decision dated July 1, 1976, this Court vacated the District Court's decision on abstention grounds and directed the certification of ambiguous state law questions to the Supreme Judicial Court. *Bellotti* v. *Baird*, 428 U.S. 132 (1976) (*Bellotti I*). Upon remand, the District Court certified a series of questions concerning the statute's requirements and standards to the Supreme Judicial Court. The parties filed briefs and offered oral argument to the Supreme Judicial Court in November, 1976, and, in an opinion dated January 26, 1977, the court answered the District Court's questions. *Baird* v. *Attorney General*, Mass. Adv. Sh. (1977)

[4] The District Court did not include Baird within its certification because of doubts about his standing. These doubts have never been resolved. *Baird I* at 851.

96, 360 N.E. 2d 288 (1977) (*Attorney General*). Proceedings and preparation for a new trial began in the District Court in early February, 1977.

Plaintiffs filed their first amended complaint on February 2, 1977. This amended complaint made slightly more explicit due process claims than the original complaint, omitted any reference to the statute's endorsement of "parental vetoes" in light of the Supreme Judicial Court's construction of it in *Attorney General*, asserted the statute's invalidity on overbreadth grounds, and claimed a denial of equal protection resulting from the exceptions contained in G.L. ch. 112, § 12F, as inserted by St. 1970, ch. 847, and renumbered by St. 1971, ch. 335, § 1. After a hearing on plaintiffs' motion for a preliminary injunction, the District Court, one judge dissenting, issued an opinion and entered an interlocutory injunction on February 10, 1978, against defendants' enforcement of the statute. *Baird* v. *Bellotti*, 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*). Defendants commenced discovery on February 22, 1977, and the parties engaged in discovery for the next eight months. Planned Parenthood League of Massachusetts and others filed a motion to intervene as plaintiffs on April 1, 1977, and plaintiffs filed a motion for summary judgment on April 5, 1977. The District Court held an initial hearing on these matters on April 5, 1977, and set the motions to intervene and for summary judgment for further hearing on April 13, 1977. At this hearing, the court denied plaintiffs' motion for summary judgment and ordered the parties to meet to arrange a tentative schedule for discovery and trial. The District Court denied Planned Parenthood's motion to intervene on April 21, 1977.

On July 13, 1977, the District Court entered an order setting the case for pre-trial conference on August 22, 1977, and requiring completion of discovery by August 19, 1977. A single judge held a hearing on August 2, 1977, during which he announced that the court had denied defendants' motion for



leave to contact members of the plaintiff class, leave which they had sought in order to conduct a survey of the consent practices of Massachusetts health care providers. The District Court held a pre-trial conference on August 22, 1977, considered various discovery matters, attempted to clarify the issues, and set the case for trial on October 17, 1977. The case was tried on October 17 and 18, 1977.

The District Court, one judge again dissenting, handed down its decision and entered an order once again declaring the statute unconstitutional and enjoining defendants from enforcing it on May 2, 1978. Although the court's decision should be read in its entirety in order to apprehend the variety of conclusions it contains, it seems fair to summarize its determinations in broad terms as consisting of several related decisions, the chief of which amount to determinations that the statute imposes impermissible burdens upon and denies equal protection to some minors. In addition, the court concluded that, despite the Supreme Judicial Court's invitation, it would not undertake to carve the offensive portions of the statute as construed from its acceptable provisions but rather would enjoin all efforts to enforce any of its requirements. Finally, the District Court awarded plaintiffs their litigation costs in both the District Court and this Court "lost as a result of defendants' mistaken advocacy." *Baird* v. *Bellotti*, 450 F. Supp. 997, 1006 (D. Mass. 1978) (*Baird III*). On June 19, 1978, the District Court allowed Planned Parenthood's and various others' motion for post-judgment intervention over the objection of all parties, and on June 20, 1978, the court entered an amended order correcting a typographical error in its May 2, 1978 order. Defendants and defendant-intervenor filed their notices of appeal to this Court in the District Court on June 26, 1978.

The case which now presents itself for this Court's review is based upon a record substantially different from that which

the Court had before it in *Bellotti I*. However, despite the additional evidence presented to the District Court and the improved understanding of the statute's provisions which resulted from the abstention and certification process and the Supreme Judicial Court's opinion in *Attorney General*, the District Court has changed its analysis almost begrudgingly[5] and its ultimate conclusions not at all. Appellants argue in the following section that the issues involved in this case transcend the limitations of a single statutory enactment and implicate conflicting principles and values of national importance. The ultimate adjustment of these conflicts is an appropriate task for this Court.

## The Questions Are Substantial

The District Court has declared unconstitutional and enjoined appellants from enforcing a statute which in large measure simply codifies the traditional Massachusetts common law rule that a physician may not perform surgery upon a minor without first securing parental consent. *See Attorney General* at 102-104, 110, 360 N.E. 2d 288, 292-293, 296; *cf. Reddington* v. *Clayman*, 344 Mass. 244, 246-247, 134 N.E. 2d 920, 921-922 (1956) (liability in tort for performance of operation on minor without parental consent). This traditional rule is not peculiar to the Commonwealth but is, rather, a restriction imposed nationally upon health care practitioners and has a lineage as well-established as that of the common

[5] For example, despite the Supreme Judicial Court's binding determination to the contrary, the District Court continues to suspect the Commonwealth's motivation and detects "a further manifestation of [its] originally found intent to recognize parents' rights . . ." inherent in the statute. *Baird III* at 1004 n.9.



law itself. As the old English and Massachusetts cases point out and the Supreme Judicial Court reemphasized in *Attorney General*, the guiding principle embodied in the common law rule and the statute which the District Court struck down is quite straightforward: promotion of a minor's best interests. *See Attorney General* at 102-104, 360 N.E. 2d at 292-293.

The District Court hardly acknowledges the statute's fundamental soundness in its opinion. Rather, the opinion concentrates on the special problems which pregnant minors, predominantly but not entirely adolescents, may experience if they seek abortion services. Then, without substantial knowledge of the consent practices of Massachusetts health care providers and on the basis of an erroneous interpretation of state law, the District Court concludes both that the statute would have an unnecessarily complicating and burdensome effect upon certain minors' ability to obtain abortion services and that it denies certain minors equal protection of the law. Further, although its opinion concerns only narrow subgroupings of the class of minors within the statute's scope, the District Court declared the statute unconstitutional in its entirety and enjoined appellants from applying and enforcing it against any physician, regardless of whether a particular case involved a minor in one of the special circumstances which concerned the court or a situation in which there would be no controversy over the appropriateness of enforcing the statute's requirements.[6] Finally, the District Court, apparently deter-

[6] For example, a non-controversial situation would be one in which the parents of a pregnant minor desired that she undergo an abortion but the minor desired to carry her fetus to term. (Without the statute's requirement that a physician must obtain the minor's consent as well as that of her parents, the usual common law approach which considers the minor's consent neither necessary nor sufficient would not serve as a bar to a physician's performing an abortion on the basis of parental consent alone.) Alternatively, a situation such as one described at trial by plaintiffs' expert would be one in which a minor, usually an adolescent, desires an abortion performed with-

mined to penalize as well as adjudicate, not only refused to enter a narrowly drafted injunction but also purported to award plaintiffs their litigation costs both in the District Court and in this Court. Appellants argue in the succeeding sections that: (1) the District Court's erroneous determination of the substantive constitutional issues involved in this litigation; (2) its willingness to entertain an unnecessary facial attack upon the statute; (3) its reliance upon an inadequate factual record; (4) its granting of unnecessarily broad relief; and (5) its punitive award of litigation costs present substantial questions of constitutional doctrine and the relationship between the federal courts and state government under our federal system which warrant this Court's plenary consideration.

## I. This Court Should Review The District Court's Determination That The Statute Is Invalid On Its Face

This case is different from most of the abortion-related cases which this Court has considered since 1973. It is different because the statute involved relates only to minors and, rather than imposing outright prohibitions, simply structures the abortion decision-making process to protect the best interests of adolescents and children. These critical differences, appellants submit, should convince this Court that the District Court's decision presents substantial federal questions worthy of its plenary consideration.

This Court has never determined that legislation like the statute which the District Court struck down is an impermissible exercise of the state's traditional authority to regulate the practice of medicine and promote the best interests of its minor

out her parents' knowledge (a process ex hypothesi contrary to her best interests) but, when appropriately counseled, changes her mind, consults with her parents, and has a healthy growth experience.



citizens. On the two occasions in which the Court has considered closely related issues, it suggested that the validity of such legislation may well turn upon the exact nature of the statute's requirements and the effect it has on the ability of minors to obtain access to abortion services. *Bellotti I* at 147-151 (comparing its observations about the statute at issue in this case and that held unconstitutional in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976) [*Planned Parenthood*]). And at least four members of this Court have expressed their view that a statute which lacks the traditional protective objective and procedural safeguards of the statute involved in this case should nonetheless be considered a proper exercise of the state's police power. *Planned Parenthood* at 94-95, 102-105 (concurring and dissenting opinion of White, J., in which the Chief Justice and Rehnquist, J., joined, and Stevens, J., concurring and dissenting).[7]

The District Court's opinion makes little mention of the views of this Court's several justices. Indeed, when appellants

[7] Two other justices expressed support for consent legislation which did not "impose parental approval as an absolute condition upon the minor's right [which the statute in this case does not] but would assure in most instances consultation between the parent and the child [footnote to *Bellotti I* omitted]." 428 U.S. at 91. The statute as construed by the Supreme Judicial Court requires, if this requirement is constitutional, that minors consult their parents in all instances. *Attorney General* at 105-113, 360 N.E. 2d at 293-297. More recently, Justice Powell has suggested that the Constitution should recognize a line between "absolute obstacles" and "unduly burden[some]" requirements which, in the case of parental consent statutes, might divide parental veto statutes (like that before the Court in *Planned Parenthood* and which are considered invalid) from parental consultation statutes (like that before the Court in *Bellotti I* and that involved in this case). *Maher* v. *Roe*, 432 U.S. 464, 473 (1977). Justice Powell has also expressed the view that there is no "justification for subjecting restrictions on the sexual activity of the young to heightened judicial review. . . ." *Carey* v. *Population Services International*, 431 U.S. 678, 705 (1977) (Powell, J., concurring in part and concurring in the judgment).

brought these views to the court's attention, their efforts were rebuked:

> In their post-argument brief defendants have modified their contention, now relying for their assertion of constitutionality on their surmise of how the individual Justices felt, based upon deductions they draw from the separate opinions in [*Planned Parenthood*]. This surmise is quite unwarranted [footnote omitted]. *Baird II* at 855.

Appellants submit that the validity of the statute as construed by the Supreme Judicial Court presents a substantial federal question in light of this Court's previous decisions. Moreover, the District Court's decision, in light of the fundamental nature of the issues this case involves, should not be the last word.

As Mr. Justice Stevens observed in *Planned Parenthood*,

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. . . . [B]elow a certain age [a minor] may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable constraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe* v. *Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.



> The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. . . . But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.
>
> The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. . . . A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decisionmaking process is surely not irrational. . . .
>
> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. . . . A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.
>
> The State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place. I assume that parents will sometimes prevent abortions which might better be performed; other parents may advise abortions that should not be performed. Similarly,

even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweigh the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible.

The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives. This assumption is, of course, correct and consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make. In all such situations chronological age has been the basis for imposition of a restraint on the minor's freedom of choice even though it is perfectly obvious that such a yardstick is imprecise and perhaps even unjust in particular cases. The Court seems to assume that the capacity to conceive a child and the judgment of the physician are the only constitutionally permissible yardsticks for determining whether a young woman can independently make the abortion decision. I doubt the accuracy of the Court's empirical judgment. Even if it were correct, however, as a matter of constitutional law I think a State has power to conclude otherwise and to select a chronological age as its standard.

In short, the State's interest in the welfare of its young citizens is sufficient, in my judgment, to support the parental-consent requirement. *Planned Parenthood* at 102-105.



Whether one agrees with every aspect of Justice Stevens' view, it is clearly a significant one, both as a statement of law and as a set of observations concerning fundamental assumptions of our social structure. The point for present purposes is that the District Court, without carefully considering the matter, rejected not only the controversial aspects of the statute's provisions (e.g., abrogation of the Commonwealth's limited mature minor rule), but also those aspects which Justice Stevens considered this Court to view as beyond peradventure (e.g., imposition of the parental consent requirement in the case of "immature minors" or minors "not capable of understanding the procedure and of appreciating its consequences. . ."). *Baird III* at 1001 (apparently but without citation alluding to the Court's discussion in *Planned Parenthood* at 75). Moreover, it suggested that its criticisms would be equally applicable to the second and third trimesters, periods which this Court's prior decisions have held amenable to state regulation. *Baird III* at 1001; *contra*, *Roe* v. *Wade*, 410 U.S. 113, 164 (1973). Appellants submit that the District Court's conclusions, totally out of harmony with rules announced in this Court's prior decisions and inconsistent with deeply embedded social traditions, present substantial federal questions which this Court should consider on the basis of full briefing and oral argument.

## II. This Court Should Determine Whether The District Court Properly Entertained And Sustained Plaintiffs' "Facial Attack" On The Statute

In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), this Court referred to a procedural facial attack[8] upon a state statute on

[8] The analysis which defendants suggested to the District Court as a means of distinguishing between plaintiffs' overbreadth claims and their substantive

overbreadth grounds and a resulting injunction against the statute's total enforcement as "strong medicine" which only the Court's particular solicitude for the First Amendment constitutional rights of absent persons justifies. *Broadrick* v. *Oklahoma*, *supra*, at 613. Passing for the purposes of this statement the obvious point that this is not a First Amendment case, appellants submit that this Court should consider whether the District Court could properly entertain a procedural facial attack and grant a broad, total injunction when, as the following analysis demonstrates, there was no need to do so.

Unlike the situation in the paradigm procedural facial attack, the plaintiffs before the District Court were those persons with arguable constitutional claims and the absentees were persons whom the statute quite properly included within its scope (e.g., minors in their second or third trimesters and minors incapable of giving informed consent). *Planned Parenthood* at 62; *Bellotti I* at 137-138.[9] At one point in its decision, the District Court seems to acknowledge this argument,[10]

complaints was to consider the former as procedural, i.e., criticisms which seek a determination that the statute is invalid not because its terms conflict with substantive constitutional requirements, but rather because it is, generally speaking, badly drafted. In contrast to these procedural facial attack claims, defendants suggested that plaintiffs were also making substantive complaints based upon notions of "undue burden" and insufficiently justified discrimination between consent requirements applicable to abortion surgery and consent requirements applicable to other types of health care services.

[9] *But see Baird III* at 1001.

[10] In discussing the statute's scope, the court stated, in disagreement with defendants' position, "[n]or do we agree with defendants that this is a case of parties seeking relief for overbreadth improperly affecting others, not before the court. *Cf. Young* v. *American Mini Theatres, Inc.*, 1976, 427 U.S. 50, 59 . . .; *Broadrick* v. *Oklahoma*, 1973, 413 U.S. 601 . . .. Plaintiffs are asserting defects in their own right." *Baird III* at 999.



but, at another, reverses itself.[11] Appellants contend that this obvious internal inconsistency in the District Court's analysis of the procedural facial attack issue presents a substantial question which warrants this Court's thorough examination. More fundamental, however, is the question whether, under the circumstances of this case and in this area of the law, the District Court should have entertained plaintiffs' procedural facial attack at all. When one considers that this Court's traditional justification for permitting procedural facial attacks in the First Amendment area has no applicability in this case, appellants submit that this Court should determine whether the District Court acted properly in entertaining and sustaining plaintiffs' facial claims.

## III. This Court Should Consider Whether The District Court Failed To Base Its Decision Upon An Adequate Factual Record

The District Court tried this case on October 17 and 18, 1977. The purpose of this trial was to resolve disputed issues of material fact which the court determined existed when it denied plaintiffs' motion for summary judgment. One of the major areas of disputed fact to which defendants pointed in their opposition to plaintiffs' motion was the consent practices of Massachusetts health care providers who deliver services to

[11] Although no evidence was submitted concerning "immature minors" (i.e., those incapable of giving informed consent) and the District Court recognized the legitimacy of defendants' contention that plaintiffs had waived any claims they might have made concerning immature minors, it held both that the rights of immature minors were involved in the litigation (despite the fact that no immature minor was a party) and that the court felt justified in considering the statute's validity in the context of second and third trimester abortions (again, as to which no evidence was submitted and as to which no minor was a party). *Baird III* at 1001, 1000 n. 5.

adolescents and children. Appellants took the position in the District Court and would urge the same view in this Court that, in order to determine whether the statute imposes an "undue burden" or unjustifiably discriminates between abortion surgery and other health care services, one must have a standard of comparison or baseline against which to judge the statute's impact.[12] In order to determine for their own purposes the nature of these baseline data, defendants decided to conduct a survey of a representative sample of health care providers in the Commonwealth and to inquire about the consent requirements they impose over a wide range of procedures, patient age groups, and social situations. However, in order to accomplish their survey, defendants required the court's permission to contact members of the plaintiff health care provider class (represented by a physician). They filed a motion seeking leave to do so in early August, 1977, and the District Court denied the motion without opinion shortly thereafter.

The limited nature of the record before the District Court renders its decision subject to question. At times the court reaches factual conclusions on the basis of an admixture of evidence and speculation (see, e.g., its comments concerning parental behavior, *Baird III* at 1001); at other points, it combines a mistaken legal observation with an avoidance of a factual analysis which the defendants had requested it to permit them to undertake (see, e.g., the impact of the statute's abro-

[12] The factual information which would comprise this standard of comparison would, in appellants, view, be in the nature of "legislative fact." Recalling the Chief Justice's concurring comments in *Doe* v. *Bolton*, 410 U.S. 179, 208 (1973), however, appellants thought it best to establish as sound an evidentiary record as they could. They do not, of course, contest the District Court's decision to proceed to trial to determine contested issues of "legislative fact." Rather, they urge this Court to consider whether the District Court erred in preventing appellants from accumulating the factual information they thought relevant to the preparation of their defense and, as discussed in the text, basing significant portions of its decision upon an insubstantial record.



gation of the Commonwealth's limited mature minor rule, *Baird III* at 1003). And, of course, it seems to make observations if not conclusions about matters as to which the record contains no evidence at all (e.g., immature minors and second and third trimester situations, *Baird III* at 1001).

The fundamental problem of which the District Court's decision in this case is only symptomatic is the use of federal litigation as a means of making novel rules of substantive law. Appellants do not quarrel with the necessity or appropriateness of this aspect of the legal process, but they do suggest that it is a process which has run somewhat awry. *See generally* Miller and Barron, The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry, 61 Va. L. Rev. 1187, 1211-1218 (1975) (criticizing reliance upon data not subject to the adversary process); *Commonwealth* v. *King*, Mass. Adv. Sh. (1977) 2636, 2650, 372 N.E. 2d 196, 204-205 (1977) (Supreme Judicial Court refused to consider statistical information concerning discriminatory enforcement of prostitution laws against women which, although probative, was not introduced into evidence but merely included in appellate brief). In order to clarify the limits of reliance upon extra-record information, establish the proper allocation of evidentiary burdens in cases such as these, and correct what appellants submit are mistaken determinations based upon insufficient information, the Court should afford this case plenary consideration.

## IV. This Court Should Consider The Appropriateness Of The District Court's Remedy

The District Court's final order, reproduced in the appendix to this statement (App. B), totally enjoined appellants from enforcing the statute. As a result, physicians and other health

care providers in Massachusetts are now entirely free, at least as a matter of civil and criminal statutory law, to perform abortions upon adolescents and children without parental consent no matter what the minor's age and regardless of her ability to comprehend the alternatives available to her. As the defendants pointed out to the District Court, pregnancies have been reported in children as young as five years old, and the incidence of pregnancies among children between the ages of ten and twelve is considerable. (See Defendants' First Set of Requests for Admissions to Plaintiff Gerald Zupnick, excerpted and reproduced in the appendix [App. D].) Moreover, as a result of the District Court's passing comments, attempts to require parental consent in second and third trimester cases would also seem doomed to the same fate which the current statute has met. See *Baird III* at 1001. Finally, even in those circumstances in which plaintiffs' own expert suggested that a parental consent requirement would be salubrious because it would prompt those adolescents who should discuss their pregnancy with their parents to do so (see the comments of Mr. Justice Stevens in *Planned Parenthood* at 104), the Commonwealth's effort to advance this interest has been enjoined.

The District Court's justification for its sweeping remedy appears to be a criticism of the Massachusetts Legislature's lack of careful draftsmanship. See *Baird III* at 999, 1005-1006. But such reasoning appears more suited to a context in which the concern is the imposition of penalties rather than the adjudication of a challenge to a state statute. In addition, such an unnecessarily broad remedy rebuffs the Legislature's and the Supreme Judicial Court's invitation to the District Court to assist the Commonwealth in striking the appropriate balance between the conflicting values[13] which legislation in

[13] The Legislature included an unusually fine severability clause in the statute, and the Supreme Judicial Court frankly declared its intention to construe the statute to satisfy constitutional requirements, both as it recognized them at the time of decision and as this Court might ultimately determine them. *Attorney General* at 100, 360 N.E. 2d at 291.



this area unavoidably implicates. It also flies in the face of the usual principles of equity which require injunctions to be narrowly drafted to meet only the specific remedial needs of the complaining parties. *Cf.* Developments in the Law — Injunctions, 78 Harv. L. Rev. 994, 1064-1067 (1965) (pointing out that specificity and narrowness are traditional criteria, discussing problems, and suggesting that broad injunctions are warranted in certain cases); *Warner & Co.* v. *Lilly & Co.*, 265 U.S. 526, 531 (1924) (Court narrowed scope of injunction). This Court should give this case plenary consideration in order to review the appropriateness of the remedy which the District Court fashioned.

## V. This Court Should Determine Whether The District Court May Award Plaintiffs Their Litigation Costs "Lost Because Of Defendants' Mistaken Advocacy"

The District Court purports to have awarded plaintiffs their litigation costs incurred not only in the trial court but also in this Court in *Bellotti I* "lost because of defendants' mistaken advocacy." *Baird III* at 1006. This action troubles appellants for two reasons: first, it amounts to a reversal of this Court's prior determinations concerning costs related to *Bellotti I*, and, second and more importantly, it seems to be further evidence of the court's aversion to defendants' representational position and its refusal to recognize the legitimacy of the Commonwealth's efforts to enact constitutional legislation in an unsettled and highly controversial area. The suggestion that appellants, the Attorney General of the Commonwealth and

its district attorneys, should be punished for performing their constitutional duty and defending a state statute which one member of the District Court determined to be largely constitutional and at least four members of this Court have indicated has a strong claim to validity should be considered unacceptable. Since the District Court apparently thought otherwise, the issue is substantial and warrants this Court's plenary consideration.

## Conclusion

For the reasons set forth above, the Court should note probable jurisdiction of appellants' appeal and set the case for argument.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General
GARRICK F. COLE
MICHAEL B. MEYER
THOMAS R. KILEY
Assistant Attorneys General
Department of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1038

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